

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 12, 2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

OGDEN CONSTRUCTORS, INC.

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Docket No. WEST 2000-77-M
A.C. No. 04-05373-05501

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley, and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 10, 1999, the Commission received from Ogden Constructors, Inc. (“Ogden”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Ogden.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Ogden asserts that its failure to file a hearing request to contest the proposed penalty for Citation No. 7966771 was due to its mistaken belief that no action was required because the citation was the subject of an ongoing investigation by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Mot. at 1. It explains that shortly after receiving the penalty proposal associated with the citation on August 18, 1999, it was contacted by an MSHA Special Investigator, who informed Ogden that he would be investigating the citation. *Id.* Ogden states that it believed that the actions against the company and any individuals were being investigated at the same time and that it requested, by letter dated September 7, that MSHA delay final disposition of the case pending the results of the investigation. *Id.* It submits that it received a letter dated October 15, 1999, from MSHA stating

that the enforcement actions against the company and individuals had been investigated separately and that penalties had been proposed separately. *Id.* Ogden states that it received the letter after the time for contesting the citation had expired. *Id.* Accordingly, it requests that the Commission reopen the case so that it may contest Citation No. 7966771.¹ *Id.* Ogden attached to its letter the October 15 letter from MSHA.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

¹ Ogden mistakenly identified the case involving Citation No. 7966771 as identified by A.C. No. 42-02242-05501, rather than A.C. No. 04-05373-05501.

On the basis of the present record, we are unable to evaluate the merits of Ogden's position.² In the interest of justice, we remand the matter for assignment to a judge to determine whether Ogden has met the criteria for relief under Rule 60(b). *See Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (April 1997) (remanding when proposed penalty became final because that individual mistakenly believed that a hearing on the individual penalty would be automatically conducted with the hearing on the penalty proposed against the operator); *M&Y Services, Inc.*, 19 FMSHRC 670, 671 (April 1997) (remanding when proposed penalty became final because operator was unfamiliar with the procedures for requesting hearing); *see also Rivco Dredging Corp.*, 10 FMSHRC 624, 625 (May 1988) (remanding when operator filed notice of contest but was unaware that contest of proposed penalties was required). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Commissioner

² In view of the fact that the Secretary does not oppose Ogden's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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